

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 50 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES
2. To be referred to the Reporter or not? YES
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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VASUDEV DHANJI VARU -DECD. THRO'HEIRS AND REP.

Versus

BHOGILAL MANOHARDAS VAISHNAV

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Appearance:

MR CH VORA for Petitioners

MR AVINASH K MANKAD for Respondent No. 1

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CORAM : MR.JUSTICE R.BALIA.

Date of decision: 17/09/97

ORAL JUDGEMENT

1. This is Second Appeal filed by the defendants against the judgement and decree passed by the learned District Judge, Kutch on 31/12/1996 affirming the judgement and decree passed by the learned Civil Judge (J.D.) - Anjar on 25/10/1988, by which the plaintiff's suit for redemption of the suit property was decreed on payment of Rs.19,055/- on or before 25th February 1989.

2. While admitting the appeal, following substantial questions of law arising in the second appeal were framed on 10/7/97.

(i) Whether there being variance between pleading and proof, any decree could have been passed in favour of the plaintiff as prayed by him for redemption of property in question in his plaint ?

(2) Whether the application for amendment for substituting the amount of mortgage as well as the pleadings on mortgage deed having been rejected by the trial Court, could any decree be founded on the basis of facts proved as alleged in the application for such amendment ?

3. The plaintiff Vaishnav Bhogilal Manohardas filed the suit on the assertion that suit house is situated in Anjar at Mistri Falia in Makawana Sheri of Ward No.2. Both these houses were originally belonging to Dayaram Mistry and mortgaged with Dhanajibhai Raghubhai through a mortgage deed on Chaitra Sud Sixth S.Y. 1999 corresponding to 16/4/43 for consideration of Rs.3,000/-. The period of mortgage was 10 years. Thereafter, the mortgage was redeemable. After the demise of original holder Mistry Dayaram, his only heir, his widow, Kantabai @ Shantabai sold the property alongwith equity of redemption to the plaintiff by a deed dated 28/1/1982, which is at exh.75 on record. Thus, acquiring equity of redemption, the plaintiff filed the present suit for redemption of the suit house. The suit for the purpose of the relief was valued at Rs.3,000/- and the cause of action according to the plaintiff arose on 10/4/53, on expiry of 10 years from the date of mortgage pleaded in the plaint. The suit was filed on 29/3/82. On 7/1/1987, plaintiff closed his evidence. Thereafter, two applications for amendment of the plaint were made, one on 22nd Sept. 1987 and another on 7th October 1987. In the first application, plaint was sought to be amended by substituting the amount of mortgage by Rs.19,055/instead of Rs.3,000/- and by later application, alternative date of the mortgage deed was sought to be added in place of Chaitra Sudi 6 of S.Y. 1999 of Chaitra Sudi 4 as well. Both these applications were rejected vide order December 09, 1987. The primary ground on which the amendments were refused that it amounts to change of cause of action which cannot ordinarily be permitted to be altered by allowing amendment, as a fresh suit on the altered cause of action on the date when the amendment application was

moved, had already become barred by time. Thus, the trial proceeded on the pleadings as they stood. Both the Courts have passed decree in favour of the plaintiff on the basis of their finding that the plaintiff has proved that the suit property was mortgaged with the defendants on Chaitra Sudi 4 of S.Y. 1999 for a sum of Rs.19,055/- by document exh.118 treating it to be a certified copy of the registered mortgage deed mortgaging the property in question with the defendants by the predecessor in title in the plaint.

4. It hardly needs a mention that the specific plea of the plaintiff was that the properties in question were mortgaged on Chaitra Sudi 6 S.Y. 1999 for a sum of Rs. 3,000/-, the facts which have to ultimately been nor proved nor have been found by the Court to have been established. As a matter of fact, in the wake of seeking amendment those pleadings appears to have been abandoned, yet, on finding the facts as alleged in the amendment application to have been proved which amendments have been refused by the trial Court, both the Courts below had decreed the suit. Thus, decree is founded on facts not pleaded by the plaintiff and cause of action not disclosed in plaint, but on pleadings which were refused to be made part of pleadings after the evidence was led. This alone is sufficient to vitiate the judgement and decree passed by the Courts below.

5. Both the Courts below had placed reliance on a decision of this Court in Valbai vs. Jadeja Sahelji 16 GLR 398 for the purpose of decreeing suit for redemption on mortgage not pleaded, but on other mortgage by holding that in a suit for redemption, decree can be granted even if one mortgage is pleaded but another is proved to exist between two parties.

6. In coming to this conclusion, the Courts below appears to have lost sight of two cardinal principles, of pleadings and proof. One is that no amount of evidence can be looked into for establishing a fact not pleaded and another that a party cannot succeed on a case not set up by him. Reference in this connection may be made to Sidik Mahomed v/s Mahomed Saran AIR 1930 PC 57.

7. In Firm Srinivas Ram v/s Mahabir Prasad AIR 1951 SC 177, the Supreme Court said;

“A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two a more inconsistent sets of allegations and

claiming relief thereunder in the alternative. The question however arises whether in the absence of any such alternative case in the plaint, it is open to the Court to give him relief on that basis.....

.....The rule undoubtedly is that Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet.``

8. Again in AIR 1972 SC 1274, the Central Bank of India vs. H.P.Jalan, the Bank had filed suit for recovery of certain amount inclusive of principal and interest thereon on the basis of mortgage. The defendant has not pleaded in his written statement that goods were not in fact delivered to him for which money could become payable. However, the High Court on examining oral evidence, found that goods were not delivered to defendant to make him liable and plaintiff's suit was dismissed. The Supreme Court in appeal observed;

``We are unable to comprehend how the High Court in the absence of any plea or issue examined the question whether the goods of value of Rs. 1,04,840/- which are stated to have been damaged by floods remained with the Bank and were not delivered to the defendants.``

9. The well known exception to above rule is where parties, notwithstanding pleadings goes on trial of an issue involving facts not pleaded without demur and led evidence on it. Explaining the principle enumerated in Siddik Mahomed's case. Supreme Court observed in Nagajibhai vs. Shama Rao AIR 1956 SC 593;

``The true scope of the rule is that evidence let in on issues on which parties actually went to trial should not be made foundation for decision of another and different issue which was not present to the minds of the parties and on which, they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence thereto.``

10. That is not the case here. The issue about

execution of mortgage on Chaitra Sud 4 S.Y. 1999 for a sum of Rs. 19,055/- was never put on issue. Thus the extension of a mortgage for Rs. 19,055/- of a different date was amended by plaintiff and put up to the defendant. In fact, the case was sought to be set up only after closure of evidence of both sides. Defendant could not be said to have gone to trial with question about mortgage, now made foundation of decree in mind, nor had he any opportunity to lead evidence in that regard and in fact, defendant has not led his evidence. Even the plaintiff in his own statement has not given any inclination of different mortgage.

11. Another rule where a claim could be sustained without pleadings, is where a party can put his claim on alternative grounds and does not plead such alternative ground, but the other side admits the facts relevant to alternative plea, on the basis of which, a claim can be decreed. As facts admitted to not require trial. Reference may be made once to Srinivas Ram Kumar's Case (1951 SC 177). The apex Court, after emphatically laying down that Courts cannot grant relief in a case not pleaded went on to add;

``But when the alternative case which the plaintiff could have made, was not only admitted by defendant in his written statement, but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which defendant himself makes.``

12. This distinction between not decreeing a suit on facts not pleaded and decreeing a claim on facts admitted by other side, has not been noticed by Courts below, though was apparent in the judgement relied on by them in Valbai's case (1975) 16 GLR 398.

13. That was a case where plaintiff claimed relief of redemption in regard to one mortgage but the Courts granted relief with respect to another on the basis of such another mortgage being admitted.

14. The Court recorded the contention as under :

``Counsel for the appellant - defendant No.1 had argued with considerable vehemence that both the lower Courts were in error in passing a decree for redemption in respect of different mortgage, though it was an admitted mortgage inasmuch as

the plaintiff had initially claimed redemption of not this but a different mortgage.``

15. The Court disagreeing with view expressed by Allahabad High Court in M/s Anaraji Kunwar vs. Kashi Bai in AIR 1914 ALL 362 and of Oudh High Court in Gani Shanker vs. Lala and another in AIR 1938 Andh 16 suggesting that plaintiff should file a separate suit, said ;

``Pray why should a litigant be driven to a fresh suit, if existence of other mortgage is admitted by the defendant? ..... The suit of plaintiff cannot be defeated merely because he has not initially claimed a relief in respect of admitted mortgage..... There is no conceivable legal bar or impediment to the Court granting a decree for redemption of an admitted mortgage merely because plaintiff claimed relief in regard to a different mortgage when the suit was initially instituted.``

16. I was taken in extenso through the pleadings of the parties as well as oral testimony. There is nothing on record from which any inference that the second mortgage, redemption of which has been decreed by the court was admitted by the defendants at any point of time.

17. It may also be pertinent to notice that, both the Courts below have proceeded on the basis that exh. 118 having been produced by a Clerk of the Registry and purports to be the certified copy of the record of the Registry, is enough to prove the execution of mortgage by the plaintiff's predecessor in title in favour of the defendants. For proving the mortgage, it was necessary for the plaintiff to have proved not only the existence of a mortgage deed concerning the property, but that the document was executed by the owner and was duly attested, as required by law by proving the signatures of the executor on the document as well as by proving attestation atleast by producing one attesting witness, as required under the provisions of the Evidence Act. At no stage, any attempt was made to prove the execution of mortgage by the plaintiff's predecessor in title or the attestation on the document by making an attempt to produce or secure production of primary evidence. Neither original of the exh. 118 which is not even a certified copy of the record, was ever sought to be produced by the plaintiff, nor any attempt was made to seek permission of the Court for leading secondary evidence by making out a case for the same. Both the

Courts below apparently have assumed erroneously that, merely by production of exh. 118 by employee of city survey office, the execution of mortgage of the suit property for a sum of Rs. 19,055/in favour of the defendant stood proved, on the basis of which a decree could be passed. No principle of law countenance such a course.

18. However, learned counsel for the plaintiff respondents have urged that he is entitled to urge at this stage that amendment has wrongly been refused and amendment may now be allowed. He also urged that the transaction evidenced by exh. 118 being the only transaction existing between the predecessor in title of the plaintiff and the defendants and the documents having been proved, it will be in the interest of justice to allow the amendment even now and sustain the decree on that basis or in the alternative, instead of suit being dismissed, the case may be remanded for trial afresh after allowing the amendment on the basis of the amended plaint.

19. The discretion in allowing or refusing an amendment of pleading rest with the Court dealing with such petition. The order is not by itself appealable, nor such order is ordinarily liable to be interfered with in revision u/s 115 of the Code of Civil Procedure. In case of Reserve Bank of India and others vs. Ramkrishna Govind Morey, AIR 1976 SC 830, the Supreme Court said an appellate Court has no jurisdiction to interfere unless in the exercise of its jurisdiction, the lower Court acted perversely or unless its view was clearly wrong or where the order is in unsupportable in law or unjust. The Court also rejected fresh amendment application filed in Supreme Court after 19 years of institution of suit.

20. In Batoo Mal vs. Rameshwar Nath and others AIR 1971 DELHI 98, High Court observed, ordinarily an appellate Court in an appeal from the decree in the suit will not interfere with the discretion of the lower Court in granting or refusing amendments.

21. In exercise of discretion while allowing or refusing amendment, delay is a relevant consideration. Ordinarily, grossly delayed prayer for amending pleadings are not to be granted. So also, bonafides of applicant too is relevant consideration, particularly where facts sought to introduced by amending pleadings were within his knowledge of applicant, and no justifiable cause is shown for not disclosing the same at the earlier stage.

This is also true that ordinarily an amendment seeking to substitute one cause of action for another is not to be allowed.

22. As will be seen presently the trial Court in rejecting application for amendment of plaint has not transgressed any of these principles, which may taint its exercise of jurisdiction with any material irregularity. It has exercised its discretion on sound principles and the order is not liable to be interfered with in appeal against decree.

23. In case of Bhagwanji Morarji Goculdas vs. Alembic Chemical Works Co. Ltd. 1948 PC 100, it approved the principle where the application for amendment introducing a new claim is made when the claim is barred by time, it cannot be allowed, wherein it is said :-

" In Their Lordships' view, the Court of appeal in India was right to refuse leave to amend, since at the time when leave to amend was sought any claim under the alleged implied agreement would have been barred by limitation."

24. In Avoch Thevar v/s Chummar AIR 1957 KER 172, the Court refused an amendment seeking to substitute one mortgage with another.

25. Position may be otherwise, where defendant while denying the mortgage pleaded, sets up another mortgage, and the plaintiff seeks to claim relief on such other mortgage by amending the pleading. As has been seen above in latter circumstances relief can be granted even without seeking amendment, on the basis of admitted facts.

26. Before considering the contention on merit, few facts need to be noticed. The plaintiff has purchased the property alongwith equity of redemption vide Annexure exh 75 purporting to be for Rs. 7,000/-. The sale deed values the right of ownerships at Rs. 4,000/- and equity of redemption at Rs. 3,000/-, the consideration of the transaction being fixed at Rs. 7,000/-. However satisfaction of consideration recorded in the deed shows that out of Rs. 7,000/-, the present plaintiff has adjusted only Rs. 4,000/- against his earlier dues and Rs. 3,000/- have been retained by him for the purpose of redeeming the mortgage. In substance, he has acquired the equity of redemption without payment of any further money.



27. In the document of sale also, the mortgage which has been referred to is a mortgage with the defendant for Rs. 3,000/- only. There is no reference to mortgage of Rs. 19,000/- in the deed. The date of mortgage has not been mentioned in the deed. Obviously, the fact about the registration and date must have been investigated by the plaintiff after obtaining deed exh. 75 in his favour and before filing the suit inasmuch as specific date of Chaitra Sud 6 S.Y. 1999, the amount of mortgage of Rs. 3,000/- has been pleaded with reference to the existing registered mortgage deed, for the production of which, a notice was also served on the defendants, which the defendant denied to exist. The defendants have denied any mortgage of that description having been ever executed and when the notice was served on them to produce that document existence of which has been denied, no document has been produced in response thereto. The pleading of date and registration could not have come on the basis of sale deed.

28. Thereafter, during the course of leading the evidence, the plaintiff has examined one Ramesh Bhimji whose statement is at exh. 115. He is a clerk in the office of Registrar, Bhuj. He in his examination in chief has produced document exh. 118 which according to him is a certified copy issued by office of registrar of the mortgage deed between the executing parties and is registered in the Minute Book, Register at Srl.No. 720. His statement reads as under:

"xZlUll xUB.721 xRm xbmjwLNXsx xRard xIr xQr  
 xbrDNSx xCid xjnB xdkfrd xInB. xQrUm xEbm xUDD  
 xCZkbm xDHrbm xQbWRm xCkVfkZkB xCkfrd xIr xQr  
 xZkDsx 57/1 xRm xBjo xIr, xQr xCkBD - 118xUk  
 xVDwhDkbu xfhWHR xflkBQb xFmbuUu xSiwQkfrJ  
 xRard xQrUm xUuBT xCZkbk xZlUxlL xXoD  
 xbmjwLb xUBXb-720 xCnVb xIr xQr xCid xdkfrd  
 xInB xCUr xYkNk xCDwhbUm xUuBT xCk  
 xZlUllXoDZkB xUBXb-721 xCnVb xIr, xQr xCid  
 xJuClUr xDjnB xInB. xCk xXUwUr xCrUwLwbmCuUm  
 xUDdu xCid xXQkfmUr xBjo xDbnB xInB. "

29. But, the document exh. 118 is not even a certified copy. It is a photo copy of certified copy purported to have been issued by the Registrar's office. In the cross examination, he has pleaded ignorance about the person who has made entries in the register. After Ramesh Bhimaji was examined on 29/3/86, the plaintiff closed his evidence on 7/1/87.

30. In plaintiff's own examination in chief, he has not conveniently stated any consideration for mortgage or date of mortgage, though pleaded in the plaint. In response to very first question in cross examination, he has divulged that, while he purchased the property, the vendor had no document with her. He got the information about the mortgage while gathering information in the city survey office after filing the suit and from there, he came to know that the period of mortgage was 10 years and that mortgage was for a sum of Rs. 19,000/-. In the same breath, he says that what he has stated in the plaint is correct. This statement atleast makes it beyond pale of doubt that the plaintiff had come to know about the mortgage of Rs. 19,000/dated Chaitra Sud 4 S.Y. 1999 much before he entered the witness box on 15/6/1986.

31. When he categorically states that the vendor had no document in her possession and the only information given to him by the vendor was that the mortgage was for a sum of Rs. 3,000/-, it is reasonable to infer that the other particulars of the mortgage viz. that it was a registered mortgage deed and was of a specific date Chaitri Sudi 6 S.Y. 1999 were founded on knowledge acquired by him through his own research prior to suit. In this context, it becomes all the more important that in examination in chief, the plaintiff conveniently misses exact date of mortgage as well as amount of mortgage. As until then, document exh.118 had not come on record or till then he has not thought it fit to amend the plaint for reasons best known to him. But the fact remains that prior to the statement of Ramesh Bhimajibhai, plaintiff had in possession of definite knowledge about the existence of the mortgage dated Chaitra Sud 4 S.Y. 1999 for a sum of Rs. 19,055/which was at variance with the facts pleaded in the plaint. It is after about eight months of his closure of evidence that the plaintiff moved first application on 22/9/1987. What necessitated the amendment in plaint according to plaintiff was that defendants has closed his evidence and during the course of evidence produced by State witnesses, it has been revealed that mortgage is for Rs. 19,055/. Therefore, the amendment has become necessary.

32. This is contrary to the facts admitted by the plaintiff himself in his statement exh.73. There is intrinsic material which supports this conclusion. Rameshbhai is total stranger to alleged mortgage and purported to be independent witness. He had no occasion to obtain a certified copy of the deed in question by himself. Either he were to obtain that certified copy on

being approached by party concerned to be produced alongwith his statements, which was not earlier produced. In that event, Rameshbhai would have produced certified copy itself obtained by him or issued by Registrar for this purpose. But that is not so. Other alternative was to produce copy supplied by the party who wanted its production. This latter course is demonstrably appears to have been adopted from the documents exh. 118 itself. The copy of document on which entire evidence of plaintiff's case is now founded intrinsically, leads to inference that the certified copy was obtained by none other then the plaintiff himself in 1983 and he was all through in possession thereof. Photo copy of which has been got produced by him through said Rameshbhai Bhimajibhai.

33. Details of application for copy, as appearing from endorsement as part of photocopy Exh. 118 shows that it was applied for by Bhogilal Manohardas plaintiff on 23/3/1983 and was delivered to him on March 31, 1983. The photo of the endorsement by stamp vendor also shows that the stamp was purchased by Bhogilal M. Vaishnav on March 22, 1983. More over, all documents connected with the mortgage dated Chaitra Sudi 4 S.Y. 1999 for Rs. 19,055/-, which were got produced through Rameshbhai are photo copies of the certified copies of the record obtained by plaintiff Bhogilal M. Vaishnav. These facts revealed from documents produced through plaintiff's witness clearly suggest that the information about the mortgage now sought to be pleaded rested with the plaintiff since 1983 much prior to the date documents were got produced through Rameshbhai and his knowledge to that effect did not depend upon statement of Rameshbhai. Even assuming it to be so, no attempt was made to amend the plaint until long after the closure of the defence evidence. These facts shows lack of bonafides of the plaintiff.

34. The substitution of a date and amount both in the suit for redemption of mortgage cannot be attributed to the incidental facts. The date of mortgage as well as amount are vital for any decree for redemption of mortgage for determining the cause of action and also question of limitation. The cause of action pleaded in the suit being the mortgage deed dated Chaitra Sud 6 S.Y. 1999 corresponding to 10th April 1993 for a sum of Rs. 3,000/- and the period of mortgage being 10 years, the limitation started running from 10th April 1953 and suit would become barred by time on 10 th April 1983, 30 years after the date when right to redeem could be first executed. If there was another mortgage of Chaitri Sudi

4 S.Y. 1999 for Rs. 19,055/-, the cause of action would be different as per facts contained in that transaction and not one pleaded by the plaintiff. The fresh suit on these facts would clearly be barred by limitation, is not in dispute.

35. In the circumstances of the case and the conduct of the plaintiff as noticed above does not warrant for taking the case within the exception to the rule as no equity exists in favour of plaintiff, nor will it occasion in failure of justice.

36. It has also strenuously urged by Mr Mankad, learned counsel for the plaintiff that the application for amending the plaint was filed under O-6 R-5 of the C.P.C., for giving the better particulars of the facts already pleaded. This plea is stated to be rejected. The two amendment sought apparently relates to substitution of different particulars of mortgage as to date and consideration than averred in plaint. The amendment is neither for giving better particulars nor for removing any ambiguity.

37. In my opinion, the trial Court was fully justified in refusing the prayer for amending the plaint by rejecting the two applications. No other contention was raised.

38. As a result of the aforesaid discussion, this appeal is allowed. The judgement passed by both the Courts below are set aside. The suit of the plaintiff is dismissed with costs throughout.

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